PART TWO – DO NON-REPRESENTATION PROVISIONS REALLY WORK?

COUNSEL'S CORNER

Matlock Place Apartments, LP (it's in Arlington Texas) was controlled by Hagop Kofdarali. Druce Properties, LLC purchased the apartments in 2004. Both were fairly sophisticated owner / operators, with at least some level of experience in managing multi-family properties.

When Hagop's sister initially purchased the property in 2002 the occupancy rate was only 40% - 50%. In 2002 and 2003 Hagop spent more than $500,000 in repair and remodel expenses, possibly as a condition to a $1.8 million loan.

Hagop then listed the property with a national brokerage firm. The firm prepared and distributed to Druce a marketing brochure which provided for a 93% occupancy rate and claimed "Major Rehab Just Completed." Hagop, however, testified at trial that occupancy could fluctuate monthly anywhere from 80% - 93%, and that the rehabilitation was incomplete because the roof repairs and unit-interiors still required work.

Druce and Hagop signed a letter of intent for $2.4 million, which provided a 21-day inspection period as well as a $100,000 credit at closing for "repairs and maintenance." Druce testified that he personally inspected the property and viewed 10 of the 99 units. He was satisfied with what he saw, and continued with the analysis.

After the contract was signed Druce received 1,500 – 2,000 pages of documents from the property manager. Included within the package were disclosures regarding delinquent rentals and serious criminal activities. Druce claims he did not notice them, since they were "buried" in the pile of paper.

Druce and Hagop closed the deal in July 2004. Druce evidently visited the property a few days before closing and noticed that it looked deserted. During that visit he also learned from an Arlington police officer that the area was well known for drug dealers, addicts and prostitutes. But he bought it anyway, claiming he was financially and emotionally invested in it, thinking that the income stream would be "gigantic."

After closing the occupancy rate was between 58% and 78%. Druce spent $800,000 to rehabilitate the property, all in an effort to merely break even.

Druce, claiming he relied on Hagop's representations as contained in the marketing piece and that such reps were untrue, brought a lawsuit seeking damages. The trial court entered Judgment against Hagop for approximately $2.4 million, finding that Hagop committed fraud by failure to disclose.

Hagop's appeal was primarily centered around the theory that Druce could not have relied on anything that Hagop (or his broker) did or did not say or represent, because of the full-blown "as is, where is, non-reliance" clause in bold, upper case type in the Contract.

The Texas Court of Appeals in Fort Worth agreed with Hagop. Judgment reversed. Hagop wins. Druce loses. A properly worded "as is, where is, non-reliance" clause may still be effective in Texas.

See *Matlock Place Apartments v. Druce*; No. 02-09-00130; Court of Appeals, Second District of Texas; January 17, 2012.

Lessons learned:

1. Last month my son published an article evaluating the continuing effectiveness of "non-reliance" clauses in commercial real estate. Recent Texas Supreme Court authority indicated that such clauses are almost extinct. This Fort Worth Court, however, has a different view.

2. Sellers should check their Contract forms to be sure they track the language of the "non-reliance" clause in this case as close as possible.

3. Buyers should check their Contract forms to be sure they track the language of the Italian Cowboys case my son wrote about last month.

Stuart A. Lautin, Esq.*

* Board Certified, Commercial (1989) and Residential (1988) Real Estate Law,
Texas Board of Legal Specialization

Higier Allen & Lautin, PC
5057 Keller Springs Road, Suite 600
Addison Texas 75001
P: 972.716.1888
E: slautin@higierallen.com
W: www.higierallen.com